No. 10077

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF OF APPELLEE

Upon appeal from the District Court of the United States for the District of Idaho, Eastern Division

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STATEMENT OF FACTS

Inasmuch as the appellant's statement of the case is somewhat argumentative and does not cover definitely certain phases of the case, it is deemed advisable to make a brief statement of the facts not thoroughly covered in appellant's statement of the case.

On September 30, 1935, the certificate of insurance sued on herein was issued by the Pacific Woodmen Life Association to Eric A. Krussman, which insured his life in the sum of $5,000.00, the same being payable to Sagred Marie Krussman, his wife, beneficiary therein named. On May 29, 1940, the beneficiary named in said certificate was changed to Marian

date received by the defendant, and all were applied in payment of monthly installments. Exhibit 19 further shows that no payment after September, 1936, was made by Eric A. Krussman during the current months except the payment for August, 1940, which was made the day before the death of said insured, but in every instance after September, 1936, payment was made by check (Exhibits G-5 to G-49, inclusive) and accepted by the defendant in the month following that in which payment was due and applied by the defendant for the installment falling due the previous month, excepting in three or four instances when the insured made payment for 2 previous months, which payments were accepted by the defendant and applied for the installments due the 2 previous months.

Exhibit G-17, being a check made payable to the defendant, dated December 12, 1937, received by the defendant on December 16, 1937, and applied by the defendant in payment of installment for the month of November, 1937, shows by notation upon its face in the handwriting of the Financial Secretary (R.264-265), that it was in payment of Installment No. 11, being the November installment. And Exhibit G-18 is another check made payable to the defendant, dated January 17, 1938, and received by the defendant on January 20, 1938, which shows on its face that it was for the "No. 12 installment," being the December, 1937, installment.

There is no evidence whatsoever in the record that any warning or notice was ever given to the insured that his certificate was not in full force and effect, although the checks were made payable to the defendant and endorsed and accepted

by it, came under the defendant's observation monthly during a period of practically four years.

On February 25, 1940, the defendant forwarded to the Insured a form letter dated February 1, 1940, bearing the signature of its president (Plaintiff's Exhibit C, R. 159-162, inclusive) in which letter it is stated in the last paragraph thereof "Our Board of Directors has authorized the payment of a Cash refund for the year 1939 upon certificates in force for two or more years, and check for yours is herewith enclosed." (R.161). A check for $10.55 (Exhibit D, R. 161) was enclosed in the letter.

On February 25, 1939, a letter bearing the signature of the president of the defendant-appellant was forwarded by the appellant to the insured (Exhibit E, R. 162-164, inclusive) in which it was stated among other things that on account of economies effected in 1938 the appellant was making another refund to each of its members over 2 years standing and that a check for such purpose (Plaintiff's Exhibit F, R.163-164) was inclosed in the letter payable to Eric A. Krussman.

On February 25, 1938, a letter bearing the signature of the president of the defendant-appellant (Exhibit F-1, R. 168-170, inclusive) was forwarded by the appellant to the insured in which it was stated among other things that on account of continued economies in management, etc. we are able to hand you the enclosed refund check. A check in the sum of $10.55 (Exhibit H) was enclosed in the letter which was for the proportionate part of the savings accumulated in 1937 and distributed to all members who are entitled to it (R.170). The first time the insured became entitled to a

refund check was in 1938 and it was based on good standing as of December 1, 1937 (R.173). Each of these refund checks (R. 194) were made to all members who had been continuously in membership for 2 years or more and were in good standing at the end of the year, meaning the year previous to the year of the issuance of the checks.

Section 105 (a) and (b) of the 1935 and 1937 Constitution, Laws and By-laws (Exhibits 3 and 4) and Section 103 (a) and (b) of the 1939 Constitution, Laws and By-laws (Exhibit 5) contain the same provisions; and Section 111 of the 1935 and 1937 Constitution, Laws and By-Laws, contains the same provisions as Section 109 of the 1939 Constitution, Laws and By-Laws and said provisions were in effect from the time the certificate was issued to Mr. Krussman up to the date of his death, said sections reading as follows:

> "Sec. 102 (a) The President and Secretary of the Society shall appoint and may remove at will a Financial Secretary for each Camp, who shall be paid at least the same compensation per member per month by the Camp as has heretofore been paid to the Clerk by the local Camp."
>
> "(b) The Financial Secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the Camp dues and Sovereign Camp fund payments and monthly installments thereof, and shall monthly pay the Camp dues so collected to the Banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the Society to the Secretary of the Society at the headquarters of the Society as provided for in Section 109."

> "Sec. 109. On or before the fifth day of every month the Financial Secretary of each Camp shall remit all the Sovereign Camp funds in his hands and all other funds due the Society to the Secretary of the Society. Such amounts shall be remitted in money order, certified check, bank cashier's check, or bank draft with exchange, payable to the order of the Treasurer. Accompanying such remittances, the Financial Secretary shall also forward such detailed statement of the standing of the members in the camp as shall be required for the information of the Secretary of the Society, upon blanks furnished for that purpose."

Monthly reports are prepared at the home office and sent out to the financial secretaries with a duplicate. The duplicate is retained by the financial secretary and the original sent back with the money (R.174). They are audited each month by the Auditing Department (R.175). The reports are due on or before the 5th day of each month, but were not received until about the 18th or 19th. That was the practice (R.181).

It was the practice and general custom of Bazil Fleming, financial secretary of the appellant at Pocatello, in dealing with a number of the members (R.261) and particularly the insured, to personally collect monthly payments of installments (R.262) after the month in which they became due, and it was his custom to call at the home of the insured where checks payable to appellant were handed to him by either the insured or someone in his behalf (R. 240, 251, 252). This practice continued with Mr. Krussman since about 1935. The checks in payment of the monthly installments bore the date that the financial secretary called for them (R.242).

The insured suffered a stroke on July 22, 1938, from

which he never fully recovered and was thereafter in a condition of ill health until the date of his death, approximately more than 2 years thereafter. Bazil Fleming, the agent of the company, saw the insured while he was in bed the day after his stroke (R.244) and from time to time thereafter discussed with Mr. Krussman the condition of his health (R.241). These discussions occurred when he would call for the checks (R. 242-243) and the financial secretary of the appellant knew at all times from the time that the insured suffered his first stroke until the date of his death that the insured was sick (R.248).

POINTS AND AUTHORITIES

I.

> "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture or a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake."

The above proposition of law is quoted with approval in Raiscot vs. Royal Neighbors, 18 Ida. 85 at page 97, 108 Pac. 1048.

Palmer vs. Sovereign Camp, WOW 15 S. E. (2d) 655 (S. C.);

Zahm vs. Royal Fraternal Union of St. Louis (Mo.) 133 S. W. 374;

Wacher vs. Life & Accident Ins. Co. of Nashville, Tenn. (Mo.) 213 S. W. 869;

McMahon vs. Supreme Tent Knights of Maccabees of the World (Mo.) 52 S. W. 384;

Order of United Commercial Travelers of America vs. Campbell, 115 Fed. (2d) 743 (9th Circ.);

Conkling vs. Knights and Ladies of Security, (Iowa) 166 N. W. 384;

Woodmen of World Life Ins. Soc. vs. Garner, 140 S. W. (2d) 414;

O'Connor vs. Knights and Ladies of Security, L.R.A. 1917 (b) 897;

Schrum vs. Sovereign Camp W.O.W., 132 S. W. (2d) 1091 (Mo.);

Head Camp, Pacific Juris, W.O.W. vs. Bohanna (Colo.) 151 Pac. 428;

Fraternal Aid Union vs. Murray (Colo.) 254 Pac. 997;

LaGrow vs. Head Camp Pacific Juris, W.O.W. (Colo.) 226 Pac. 1086;

Perrigo vs. Commercial Travelers Mutual Accident Assn. (Conn.) 127 Atl. 10;

Edmiston vs. The Homesteaders, 144 Pac. 826 (Kan.);

Phillips vs. Brotherhood of Ry. Emp. etc. 285 N. W. 159 (Iowa);

Hartford Life & Annuity Ins. Co. vs. Unsell, 144 U. S. 439; 36 L. Ed. 496;

Sovereign Camp, W.O.W. vs. Newsom, 142 Ark. 132, 219 S. W. 759, 14 A.L.R. 903;

Satcher vs. Woodmen of the World Life Ins. Soc. (S.C.) 18 S. E. (2d) 523;

Soleyman vs. Woodmen of the World (La.) 3 So. (2d) 466;

II.

"Once a regular course of conduct on the part of the association in accepting overdue assessments without objection has become established, the only way the association can acquire the right to insist upon a forfeiture for failure to pay an assessment within the time fixed by the bylaws is by giving the insured personal notice that thereafter punctual payment will be required." 38 Am. Jur. 523, section 113.

Zahm vs. Royal Fraternal Union, 133 S. W. 374 Mo.;

Steuernagel vs. Supreme Council of Royal Arcanum 137 N. E. 320 N. Y.

III.

"A provision that no subordinate lodge or officer shall have power to waive conditions does not prevent a waiver by the society itself or by the supreme body or its officers or agents." 45 Corp. Juris. page 146, Sec. 117.

Trotter vs. Grand Lodge Legion of Honor, 132 Iowa, 513, 109 N. W. 1099;

Fries vs. Royal Neighbors of America (Mo.) 210 S. W. 130;

Steuernagel vs. Supreme Council R. A. (N.Y.) 137 N. E. 320;

Sovereign Camp W.O.W. vs. Tam. (Okla.) 216 Pac. 660;

Peterson vs. Modern Woodmen of America (Wash.) 220 Pac. 809;

Lagrow vs. Head Camp Pacific Jurisdiction Woodmen of the World (Colo.) 226 Pac. 1086;

IV.

"It is a well settled rule that the doctrine of waiver by acts and conduct is applicable to fraternal societies as well as to regular insurance companies. In fact, it is applicable to all conditions and contracts which may be assumed to have been waived by a continued course of conduct between the parties themselves." Bonnet vs. Grand Lodge, V. R. T. 81 S. W. (2d) on page 367.

Zahm vs. Royal Fraternal Union of St. Louis (Mo.) 133 S. W. 374;

Wacher vs. Life & Accident Ins. Co. of Nashville, Tenn. (Mo.) 213 S. W. 869;

McMahon vs. Supreme Tent Knights of Maccabees of the World (Mo.) 52 S. W. 384;

Palmer vs. Sovereign Camp, W.O.W., 15 S.E. (2d) 655 (S.C.);

Sovereign Camp. W.O.W. vs. Newsom, 142 Ark. 132, 219 S. W. 759, 14 A.L.R. 903;

Soleyman vs. Woodmen of World (La.) 3 So. (2d) 466;

Trotter vs. Grand Lodge Legion of Honor, 132 Iowa, 513, 109 N. W. 1099.

V.

"Statutory law authorizing the constitution and laws of a fraternal benefit society to provide that no subordinate body can waive any provision of the by-laws does not prevent waiver of such provision by the supreme body, and the knowledge is imputed to it from the knowledge of its local council." Steuernagel vs. Supreme Council of Royal Arcanum (N.Y.) 137 N. E. 320.

Peterson vs. Modern Woodmen of America (Washington) 220 Pac. 809;

Order of United Commercial Travelers of America vs. Campbell, 115 Fed. (2d) 743 (9th Circ.)

Sovereign Camp Woodmen of the World vs. Newsom 219 S. W. 759 (Ark.).

VI.

"Forfeitures are not favored in the law; courts in order to avoid the odious results of a forfeiture are not slow in seizing hold of such circumstances as may have been acted on in good faith and which indicate a waiver of strict compliance of the terms of the policy."

Rasicot vs. Royal Neighbors, 18 Ida. 85-108 P. 1048;

Palmer vs. Sovereign Camp, W.O.W. (S.C.) 15 S. E. (2d) 655;

Satcher vs. Woodmen of the World Life Ins. Soc. (S.C.) 18 S. E. (2d) 523;

Soleyman vs. Woodmen of the World (La.) 3 So. (2d) 466;

Sovereign Camp Woodmen of the World vs. Newsom, 219 S. W. 759 (Ark.)

VII.

"Upon an appeal from a judgment the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside," Section 11-219 Idaho Code Annotated (1932).

VIII.

"It is the general, well-established rule that where, by a custom or course of dealing, a mutual benefit society has led a member to believe that prompt payment of premiums, assessments, or dues will not be required, but that they will be received and accepted after due, and that he will be considered in good standing, the society will be held to have waived prompt payment and to be estopped to invoke forfeiture for failure thereof, and the member will be deemed to be legally in good standing for such reasonable time

after he is delinquent as has theretofore customarily been allowed him in which to make payment." 38 Am. Jur. 523, Section 113.

Soleyman vs. Woodmen of World (La.) 3 So. (2d) 466;

Rasicot vs. Royal Neighbors 18 Ida. 85, 108 Pac. 1048.

IX.

The financial secretary of a local camp of a fraternal benefit society, who is the agent of the society to collect and remit dues of members, attend to the correspondence concerning standing of members, make all reports, mail all notices, assist in change of beneficiaries and perform other duties, is the agent of the society, and while acting within the actual scope of his authority binds the society, and notice to him of delinquency and health of the members under such circumstances is notice to the society.

Satcher vs. Woodmen of the World Life Ins. Soc. (S.C.) 18 S. E. (2d) 523;

Sovereign Camp, W.O.W. vs. Key (Ark.) 230 S. W. 576;

Palmer vs. Sovereign Camp, W.O.W. (S.C.) 15 S. E. (2d) 655.

X.

"The secretary of local camp of fraternal beneficiary association is 'agent' of sovereign camp of association, and association's laws attempting to circum-

scribe local secretary's authority and limit his power as such agent do not override general law governing relation of principal and agent, where secretary is appointed to office and can be removed at will by president and secretary of association." Palmer vs. Sovereign Camp, W.O.W. (S.C.) 15 S. E. (2d) 655.

Woodmen of World Life Ins. Soc. vs. Garner 140 S. W. (2d) 414 (Ark.)

Sovereign Camp W.O.W. vs. Key 230 S. W. 576 (Ark.).

XI.

Where the court has found as a fact that prompt payment of assessments has been waived and that the insured was not suspended, the question of his illness, and whether any of the officers of the Sovereign Camp had knowledge thereof, became immaterial, for the issue of fact does not concern reinstatement but suspension only.

Jones vs. Sovereign Camp W.O.W. (Ala.) 171 So. 359; also 178 So. 891;

Woodmen of World Life Ins. Soc. vs. Garner 140 S. W. (2d) 414 (Ark.);

Palmer vs. Sovereign Camp W. O. W. 15 S. E. (2d) 655 (S.C.);

Conkling vs. Knights and Ladies of Security 166 N. W. 384 (Iowa);

Harris vs. Sovereign Camp W.O.W. 15 S. E. (2d) 793 (Ill.).

ARGUMENT

Appellant's specifications of error (which attack the Findings and Conclusions of the Court), are so interrelated we deem it best to treat them as a whole in order to avoid repetition.

Appellant contends that all overdue payments were made for the purpose of reinstatement, rather than for the purpose of continuing the certificate of insurance in force, and that appellant did not waive strict compliance with its laws, constitution and contract with reference to prompt payment, and that the manner and way in which the appellant dealt with the insured over a long period of time does not, at this time, estop it from insisting upon strict and literal compliance with the laws, constitution and contract.

The findings of the Court (Finding No. 19, R. 70) supported by the evidence, are to the effect that appellant always treated insured in good standing and that the payments made by insured were not for reinstatement but were for the purpose of continuing the certificate of insurance in force, etc. As evidence of this fact there were no current payments made by Mr. Krussman after September 1936. At the time the certificate in this case was issued, and up until September 1, 1937, Section 65 of the 1935 Laws and Constitution of the appellant (Paragraph V of appellant's answer, R. 30), provided that if a member was suspended for failure to pay promptly his monthly premium the only way he could be reinstated would be by making all of the delinquent payments including payment of the installment for the *current month.* The undisputed record discloses that all of the payments from September 1936 to September 1937 were made after the month in

which they became due, and in no instance was there any current installment paid. These facts were actually known by the Home Office of the appellant for the reason that the insured made his checks directly payable to the appellant; the checks were collected by the financial secretary and transmitted to the appellant itself, who accepted and endorsed the same and made application of the proceeds on the certificate, and the appellant had actual knowledge of the time each installment was paid for a period of approximately 4 years, and had actual knowledge that none of the monthly payments of installments after September 1936 were paid during the current month (Finding of Fact No. 5, R. 54-55).

It is clear that until the effective date of said amendment the acceptance by the appellant of the delinquent payments could not have been for reinstatement under the strict interpretation of the constitution and laws for the reason that it was necessary that the *current* payment be made, which was not made, showing that the appellant was accepting said payments for continuing the certificate in force and not for reinstatement. Notwithstanding said amendment, the appellant did not change its practice of accepting delinquent installments and did not notify the insured that it intended to insist on punctual payments of said premiums, but continued the custom and practice so established until the death of the insured; and the appellant is precluded from insisting on strict compliance with the constitution, by-laws and certificate at this time for the reason that, if the company desired to change its practice in respect to accepting delinquent assessments, the law required that the insured receive notice of such change (38

American Jurisprudence 523, Section 113, Points and Authorities No. III).

As further establishing the fact that it was the clear intention of the parties that payments made by Mr. Krussman and accepted by the appellant company prior to and subsequent to September, 1937, (the effective date of said amendment) were made for the purpose of continuing the contract in force rather than for reinstatemnt, the court's attention is called to Exhibit F-1, being a form letter dated February 25, 1938, sent to the insured together with a refund check to him covering gains and savings on his certificate for the year 1937. This letter recognized that the insured had been in good standing with the appellant company for the years 1936 and 1937 and was in good standing on the first day of January, 1938. It will be observed that on February 25, 1939, a letter (Exhibit E. R. 162-164, inclusive) was signed by the president of the appellant inclosing a refund check and was sent by the appellant to the insured in which it was stated among other things that the appellant was making another refund to each of its members of over 2 years standing and that a check for that purpose was inclosed. Here the insured is told in plain language that he is and has been a member in good standing for over 2 years. On February 25, 1940, another letter signed by the president of the appellant company was forwarded by the appellant to the insured, Mr. Krussman, stating among other things that the board of directors had authorized the payment of a cash refund for the year 1939 upon certificates in force for 2 or more years and that the insured's check for that purpose was inclosed. These letters definitely stated to

the insured that he was and had been in good standing since January, 1936. They further show that the insured was recognized as a member in good standing during all of that time. When these letters and each of them were written the appellant had actual knowledge that the insured had been making his payments after the end of the month in which each became due and not in accordance with the strict and literal terms of the certificate and constitution and by-laws of the appellant. The trial court found that during all that time the appellant had actual knowledge of the time each installment was paid for nearly 4 years (Finding No. 5, R. 54-55). Notwithstanding this knowledge on the part of the appellant, it unequivocally told the insured that he was in good standing and had been for more than 2 years previous to each of said letters.

In view of the undisputed evidence in this case, it is very apparent that the insured, as a reasonable man, was led to believe, and did believe and understand, that prompt payment of monthly installments would not be required, but that they would be received and accepted after due, and that he fully believed that his certificate of insurance was in full force and effect and that he was a member in good standing in said society.

It seems to us that the insured could have come to no other belief or conclusion than that he was in good standing, when, in addition to all the other evidence in the record, the president of the company as late as February 1, 1940, wrote to the insured stating that "the Board of Directors had authorized the payment of a cash refund for the year 1939 upon certificates in force for two or more years," and had received

letters of similar import for prior years with refund checks enclosed. It seems to us that any reasonable person would have come to the same conclusion as the insured did in this case, that his certificate was in full force and effect. That the said insured did fully so believe is further evidenced by the letter which he wrote to his son, Harry E. Krussman, June 20, 1940 (Exhibit 16) creating the trust, in which he stated that he was going to change the beneficiary to his son, with instructions as to how the proceeds of the certificate in question should be paid, and closing his letter by saying that he had always been grateful to his son for what he had done and for what he would do in taking care of the handling of the proceeds of the certificate, which, the insured stated, was the most important thing to him which he could conceive of. As further evidence that he believed his certificate was in full force, he changed his beneficiary in the policy in May and July preceding the date of his death in August.

It is, therefore, clear from the record that the insured was lead to believe by the appellant, and did believe, that he was in good standing and that his certificate of insurance was at all times in full force and effect; and the record in this case clearly shows that there was a waiver on the part of the appellant as to prompt payment of monthly installments, and that the appellant is estopped from invoking the forfeiture of said contract for failure to make prompt payment, and the trial court so found and held (R.74).

The rule in this state is as stated in Rasicot vs. Royal Neighbors of America, 18 Idaho 85, wherein at page 97 the court approved the following doctrine:

> "And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake."

This same rule of law was announced in the case of Order of United Commercial Travelers vs. Campbell, 115 Fed. (2d) 743, wherein the Circuit Court of the Ninth Circuit, in affirming the judgment of the trial court states the law as follows:

> "Too, it is the rule that the existence of a waiver depends upon the effect of the insurer's actions upon the insured, not upon what the insurer intends. If the conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continued despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture. Morgan vs. Northwestern National Life, 42 Was. 10, 84 P. 412, 7 Ann. Cas. 382."
>
> (Points and Authorities I.)

It is contended by the appellant that the company did not have actual knowledge of the ill health of the insured and that there could be no waiver or estoppel on that account. Under the record in this case, it is submitted that the health of the insured is immaterial because the defendant treated the certificate sued on in force, and the question of reinstatement is not involved (Points and Authorities I., II., XI.). But, assuming for the purpose of argument that this question is involved, which we do not concede, let us consider briefly the

evidence on the question of actual notice. The financial secretary being dead, the only available testimony would be from the records of the defendant. Mr. Pakes did not say he had examined all of the records and files pertaining to this matter to ascertain whether the secretary or any other general officer of the company knew of Krussman's illness. It is undisputed that there was no concealment of Krussman's illness. The financial secretary had positive knowledge of insured's illness or condition right after his fisrt stroke. Whether the financial secretary, the defendant's agent, whose duty it was to report the standing of members, failed to perform his duty and notify the secretary or the president of the appellant company, the record is silent except the statement of the assistant secretary that he had no knowledge of Krussman's illness, and that as far as he knew, no other officer did (R.208). It is quite probable that the secretary, the auditors or any of the officers of the Sovereign Company could have received actual knowledge without Mr. Pakes, the assistant, knowing it. The assistant secretary did not testify that he had made any examination of the records and files of the office of the appellant to ascertain whether any letter or other notice of the ill health of the insured had been given by the financial secretary, the appellant's agent. He stated that they did not examine the checks that were sent by the financial secretary when they came in and that the secretary or treasurer could not know all the details (R.182). If the assistant secretary did not examine the checks, it is fair to assume that the information could have been communicated without his knowing it. In any event knowledge would be imputed to appellant (Points and Authorities IX.)

In the case of Rasicot vs. Royal Neighbors of America, 18 Idaho at bottom of page 97, the court approved the following proposition of law:

> "The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of Pringle's conviction *to the head camp.*"

In Steuernagel vs. Supreme Council of Royal Arcanum, 137 N. E. 320, N. Y., the court speaking through Justice Cardozo, in paragraph 5 on page 323, says:

> "The defendant attempts to avoid the effect of its inaction by the disclaimer of knowledge of the events which entitled it to act. We are without evidence that the local council made prompt report to the Supreme Secretary of the disappearance of the member. No such evidence is necessary. The defendant is chargeable with knowledge of the council, whether report was made or not. Lewis vs. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 396, 74 N. E. 224, 106 Am. St. Rep. 557. The duty of disclosure in the language of some of the cases is "presumed" to have been discharged (Henry vs. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; Hyatt vs. Clark, 118 N. Y. 563, 569, 23 N. E. 891; Mut. Life Ins. Co. of N. Y. vs. Hilton-Green, 241 U. S. 613, 622, 36 Sup. Ct. 676, 60 L. Ed. 1202), and except in circumstances of adverse interests or of fraud, evidence will not be heard that the duty was ignored (2 Mechem Agency, pp. 1806, 1813). Knowledge being imputed, the courts are to interpret in the light of the imputation the significance of the events that followed. We start with the hypothesis that duty has been done."

The question of reinstatement and health of the insured is not involved for the reason that the insured was not suspended (Finding No. XI. R. 56), as the appellant treated at all times the insured's certificate as continuing in full force and effect. (Palmer vs. Sovereign Camp, W.O.W., 15 S. E. (2d) 655).

In the case of Harris vs. Sovereign Camp, W.O.W., 23 N. E. (2d) 793, the identical contention was made by the defendant, and the court in disposing of such contention says on page 799:

> "A case of particular interest in connection with the evidence and the law involved in the instant case, is that of Route vs. Royal League, 274 Ill. App. 152. In that case the facts in many respects approximated those in the instant case, and the pleadings were practically the same. The same contentions were made by the defendant on the point of reinstatement of the insured, but the Court pointed out in that case, as is clearly true in the instant case, that it was not a question of reinstatement of a suspended member which the Court was called upon to decide, but the question was whether or not the insured's membership had been suspended; whether or not the insurance had become forfeited: or whether the default in payment of the premiums had been waived. In that case the payment of the past due premiums was made to the association, and accepted, after the insured was dead. The Court in that case says (at page 173) : 'A fraternal benefit society will not be permitted to treat a benefit certificate as alive and in full force, and accept the member's money over a period of years in violation of suspension and forfeiture provisions of its contract until death occurs, and then for the first time seek to avoid the certificate and escape its liability. Neither will such an association be permitted to insist on the forfeiture

of a benefit certificate issued by it for nonpayment of assessments when due, where its course of dealings with the member has led her to believe that the provisions for forfeiture would not be relied upon.'

"The conclusions of the Court in the Routa case, supra, are equally valid in this case. The Court in that case determined that the insured continued as a member of the fraternal benefit association and that the certificate of the deceased had not been forfeited prior to death. In the instant case it is our conclusion that James Harris was never suspended from membership and that his certificate was never forfeited."

In Woodmen of World Life Ins. Soc. vs. Garner, 140 S. W. (2d) 414, the defendant set up as a defense, Section 65 of the Constitution, Laws and By-laws, which section is in substance identical with Section 65 set up in this case as a defense, the Court on page 415 in passing on the matter said:

"We think the trial court was correct in holding that Andrew J. Garner did not become a suspended member by reason of the irregularity of payments in the four instances above mentioned and that he did not make the payments subsequently 'for the purpose of again making him a member.' The second paragraph of Section 65, above quoted, is conditioned as follows: 'Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant,' etc. Now, if Mr. Garner did not 'become suspended,' the payments made by him although out of time, were not made 'for the purpose of again making him a member,' and all the remainder of that part of section 65 has no application. If not suspended, he never ceased to be a member. He was not suspended because he was never treated as a suspended member by either the Financial Secretary or the Home

> office. He was never so advised. His money was accepted regularly or irregularly and no one connected with appellant ever advised that his payments were made merely for the good of the order. * * * Appellant has tried to avoid this rule of law by a provision in the latter part of said section 65 and the provision contained in subsection (a) of section 66, the former relating to what shall constitute a waiver, and the latter relating to both waiver and estoppel. Appellant can not thus relieve itself of the burdens of a positive rule of law by an ex parte declaration in its constitution, laws and by-laws, stating the conditions under which it will be relieved by waiver and estoppel. It would appear to be as much against public policy as it would for a railroad to contract against its own negligence, or that of its officers and agents."

In Schrum vs. Sovereign Camp, W.O.W., 132 S.W. (2d) 1091 (Mo.) it was urged that under a similar defense as set up in the instant case, the delinquent payments were for reinstatement, and the Court, in holding that the payments were not made for reinstatement, but under the contract, said among other things, (p. 1095):

> "In the present case current assessments, save two, were never paid along with the payment of delinquent assessments, and were rarely paid during the months the delinquent assessments were paid. The law of the association requires the payment of the current assessment as well as all delinquent assessments to entitle the insured to reinstatement."

Prompt payment of installments as provided in said certificate having been waived, the question of reinstatement and health is immaterial (Points and Authorities XI.). If the payments had been made in accordance with the terms of the

contract, it would be wholly immaterial whether insured was sick or even dead at the time payment was made. The indemnity is against death occurring while the certificate is in force.

In Conkling vs. Knights and Ladies of Security (Iowa) 166 N. W. 384, at page 387 it is stated as follows:

> "While the contract provided that these payments should be made within the month to preserve the integrity of the certificate, the society permitted the assured to make payments after the month, and *treated his certificate as still continuing, and it must treat this payment the same.*" (Italics ours)

At page 390 the court further said:

> "We think, therefore, the court was justified in holding that the previous dealing between these parties, touching the time of payment of dues, was of such a character (supposing the assured to be a man of reasonable prudence and caution), as to lead him to believe that the company was not insisting upon a strict performance of the contract, and that it was willing to receive payments at any time after the time fixed in the contract if made within a reasonable time, and that payments so made held the contract in force; that defendant's previous conduct in accepting payments made after the time fixed in the contract was a waiver of its right thereafter to insist that the contract was forfeited by the failure to make payment strictly and in accordance with the terms of the contract; that it is now estopped to say that this payment was not made in time to keep the contract alive. *This being true ,the question of reinstatement, under the other provisions of the contract, is not involved, for the payment made within the time theretofore recognized as sufficient to keep the policy alive was sufficient to avoid a forfeiture or suspension, and therefore there*

was no occasion for reinstatement, and the court so held." (Italics ours)

See also the case of Palmer vs. Sovereign Camp W.O.W. (S.C.) 15 S. E. (2d) 655, where it is stated on page 660:

"The fact that Palmer was not in good health, when he made his payments in the month following the month in which they fell due, will not relieve the association. The local financial secretary was fully advised of Palmer's illness, and payments made under those circumstances could not, as provided by the rules of the order, constitute a warranty of good health. The very information, which the local secretary received at the meeting of his Camp held on May 14th, was a denial of the warranty of good health; and the specific information imparted by Ray Curtis, the son-in-law of Palmer, when he paid the September and November assessments, of the illness of the insured, was likewise a denial of the warranty of good health, which the rules provided the payment imputed.

"It can not be successfully contended that if Palmer had in strict accordance with the by-laws made his payments of April, August, September, November, and December, 1938, and for March and May, 1939, before the last day of each of these months, the condition of his health at such times of payment would in any wise have been material. Nor can it be doubted that under the uniform practice and custom, Palmer, but for his death, could, and doubtless would, have gone on through the years making his overdue payments, and the local secretary and the Sovereign Camp would have gone on accepting and retaining such payments.

"We think that the doctrine of waiver and estoppel removed from the case the provisions for forfeiture and the effect of Code, Section 8047."

Jones vs. Sovereign Camp, W.O.W. 178 So. 891; 171. So. 359 (Ala.);

Satcher vs. W.O.W. Life Ins. Soc. (S.C.), 18 S.E. (2d) 523.

Appellant throughout its brief predicates much of its argument on Sections 40-2309 and 40-2331 I.C.A. Section 40-2309 merely provides that the constitution, laws and amendments thereto shall form part of the agreement between the society and its members; this section merely declares what shall constitute the contract and has nothing to do with the law of waiver and estoppel. Section 40-2331 provides:

> "The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

It will be observed that said section does not authorize the appellant company or any of its officers to enact a provision restricting the society or any of its officers to waive any of its laws and constitution. It is therefore apparent that said section has no application because the waiver in the instant case was on the part of the appellant itself.

Points and Authorities III.

In Steuernagel vs. Supreme Council of Royal Arcanum, 137 N. E. 320, the defendant made the same contention as

the appellant is urging in this case with respect to the effect of the statute in question and the court speaking through Justice Cardozo, at page 323, in considering the effect of the New York statute, which is identical with the statute in this case, said:

> "The defendant gets no aid from section 239 of the Insurance Law (Consol. Laws, c. 28): 'The defendant is not charged with any waiver by the local council. It is charged with its own waiver, the inaction of the central body. Disability to waive is not the same as disability to learn and to report.'"

The rule of law approved in Rasicot vs. Royal Neighbors (Supra) with reference to waiver and estoppel, above set out, is in no manner affected by said sction 40-2331, nor is the doctrine that waiver and estoppel applies to fraternal or lodge insurance, announced in the Rasicot case, affected or changed by said section.

It is asserted by appellant that said statutory provision announces the public policy of state. It will be observed from said section that there is nothing bearing upon public policy of state and there is nothing in conflict with what is said in Rasicot vs. Royal Neighbors (18 Ida. 85) wherein the Idaho court said at page 98:

> "The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him, when acting honestly and from the most laudable motive, to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then when the benefi-

> ciary comes to make demand for that paltry recompense to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large which we term public policy."

Appellant contends that the case of Conkling vs. Knights and Ladies Security (Ia.) 166 N. W. 384, cited by the trial court in its opinion was not the last announcement of the Iowa Court, and quotes a paragraph from Whitlow vs. Sovereign Camp, W.O.W. 202 N. W. 249, without reciting the facts which were entirely different. In the last mentioned case the insured who had been a member of the defendant company became insane and thereafter application for old age disability benefits was made, and the certificate surrendered and released for a consideration, acknowledging complete satisfaction in payment under the certificate. The facts are so utterly dissimilar in the two cases that the Whitlow case does not in any way change the law announced in Conkling vs. Knights and Ladies (Supra). We invite a comparison of the two cases.

It would unduly lengthen this brief to attempt to review all the cases cited or quoted from by the appellant. But we will briefly analyze the facts in some of the cases upon which the defendant places principal reliance.

In Whitehorn vs. Royal Arcanum (Neb.), 269 N. W., 821, cited by the appellant, the facts are entirely different from the facts in this case, but the Court in that case approves the rule of law announced in the case of Chandler vs. Royal Highlanders (Neb.), 162 N. W. 642, in which it was held:

> "If such association adopts a custom of receiving payment of dues after the day named in the contract for such payments, and thereby leads the assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association thereby waives the right to forfeit the policy for delay of payment which is tendered in accordance with such custom."

In the case of Tatro vs. Modern Woodmen of America (Ill.), 2 N. E., (2d) 107, relied upon by the appellant, there was concealment and fraud involved, and the facts are entirely dissimilar to the facts in the instant case. However, since the decision in the Tatro case the Illinois Court in Harris vs. Sovereign Camp, W.O.W., 23 N. E. (2d) 93 (supra), from which we have heretofore quoted, definitely holds against the contention of the appellant in this case.

In the case of Valentine vs. Head Camp, Pac. Juris, W.O.W. (Cal.) 180 Pac. 2, relied upon by the appellant, it appears that as far as delinquent payments were concerned, they were never reported to the head camp, although the clerk of the local camp had in the past advanced certain assessments; but in August, 1912, he failed to do so and reported the insured as delinquent for failure to pay his July assessment. It appears that this was the first intimation the head camp had of any delinquency, all previous reports showing that he had regularly paid his assessments. He was injured on August 17, 1912, and on August 19 the beneficiary paid the clerk of the local camp all amounts accruing for assessments and dues to September 1, including the July assessment. Application for reinstatement was signed by the insured after the injury in which

he warranted and represented that he was in sound bodily health. It is apparent that the facts in this case do not in any way resemble the facts in the instant case.

In the case of Sovereign Camp W.O.W. vs. Hart (Ga.), 200 S. E. 296, cited by appellant, an examination readily discloses facts very different from those in the case at bar. The home office of the association had no actual knowledge that any of the monthly installments had been paid to the Clerk of the local council after the expiration of the month for which they were due. Whereas, in the instant case the checks were made payable to the Sovereign Camp. The facts are so dissimilar that we are unable to see how the Hart case can be any aid in the solution of this case.

The appellant in support of its position cites the following cases from Alabama:

Sovereign Camp vs. Cox (Ala.) 127 So. 847;

Sovereign Camp vs. Gay (Ala.) 93 So. 559;

Woodmen of the World vs. McHenry (Ala.) 73 So. 96;

Yarbrough vs. Sovereign Camp W.O.W. (Ala.) 97 So. 654.

However, we find that the latest announcement from the Supreme Court of the State of Alabama supports the position of the appellee in the case of Jones vs. Sovereign Camp, W.O.W., 171 So. 359 (Ala.), wherein at page 361 it was said:

> "If insured was in fact never suspended, the question of his illness, and whether or not any of the officers, either local or sovereign, had knowledge thereof, became immaterial, for the issue of fact does not concern reinstatement, but suspension only.
>
> "We conclude therefore, for the reasons stated under the agreed facts, the question as to insured's suspension was one for the jury, and that the trial court committed error in giving for defendant the affirmative charge."

Furthermore, an examination of the facts in the Jones case will readily disclose that they are not nearly as strong on the question of waiver as are the facts in the present case.

Appellant has quoted extensively from the case of Sovereign Camp W.O.W. vs. Moraida (Tex.) 113 S. W. (2d) 177. There is nothing in the Moraida case showing that the company had actual knowledge of the manner in which payments of the monthly installments were being made, when as in the case at bar checks were sent direct to the appellant, some bearing notations specifically setting forth the time monthly payments were being made. Furthermore, in the Moraida case there are no letters from the president of the Sovereign Camp to the insured stating that the insured was in good standing as is the fact in the present case. The case will disclose facts very dissimilar in many particulars from the facts in the present case.

In the case of Van Dahl vs. Sovereign Camp W.O.W. (Neb.) 264 N. W. 454, relied upon by appellant, the facts briefly are that the insured failed to pay installment for December, 1932, on or before the last day of the month, and on

January 16, 1933, he paid the delinquent installment for December and on January 31, 1933, he paid the installment for January. He died on February 4, 1933. It will be readily seen that the facts are so dissimilar to the facts in the instant case that the principles of law applied in that case would have no application here.

In the case of Balogh et al. vs. Supreme Forest Woodmen Circle, 280 N. W. 83, which is the latest case from the state of Michigan cited by appellant, the court at page 86 said:

> "There is nothing to indicate that the defendant or the insured ever regarded the contract as in force during the periods between default and reinstatement."

This distinguishes that case entirely from the case at bar.

We do not deem it advisable to make any further review of the cases cited by the appellant, as an examination of all cases cited by appellant will disclose that there is not one where the facts are parallel to the facts in this case. We are unable to find any case in which the insured dealt directly with the sovereign camp or head office by making all checks payable to the head office, bringing actual knowledge to the head office of the time each payment was made. In none of the cases cited by the appellant were letters forwarded to the insured advising him that he was in good standing and inclosing refund checks based upon said standing (as was done in the case at bar) or any case in which any letters were written stating that the contract was in good standing.

Appellant contends that the case of Order of United Travelers vs. Campbell, 115 Fed. (2d) 743, does nothing

more than announce what the circuit court considered to be the law of the State of Washington. The law of Washington found in paragraphs 1, 2 and 3 of this court's opinion is as follows:

> "The Washington court adheres to the rule that the by-laws of a fraternal insurance society may be waived by a custom acquiesced in by the society. Kennedy vs. Supreme Tent, Knights of Maccabees, 100 Wash. 36, 170 P. 371. The acts and declarations evidencing the custom may be those of the society itself or those of its agent. And this is true even though the constitution of the order provides that the collecting officer of the local organization has no power to waive the provisions of the constitution. As a matter of law, the knowledge of the agent is the knowledge of the society. Peterson vs. Modern Woodmen of America 127 Wash. 412, 220 P. 809."

> "Too, it is the rule that the existence of a waiver depends upon the effect of the insurer's actions upon the insured, not upon what the insurer intends. If the conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continues despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture. Morgan vs. Northwestern National Life Co., 42 Wash. 10, 84 P. 412, 7 Ann. Cas. 382."

The law of Idaho announced in Rasicot vs. Royal Neighbors of America (supra) is the same as the law of Washington. It will be further observed that the language used in the Washington case is very similar to the language used in the case of Rasicot vs. Royal Neighbors of America on the question of waiver and estoppel and the rule of law announced in

the two cases is the same. Appellant seeks to avoid the affect of the Rasicot decision by the Idaho court by contending that it was decided prior to the passage of the statute in question and a different rule would have been announced had the statute been in effect at the time the Rasicot case was decided. It is significant to observe, however, that the supreme court of the state of Washington, when confronted with the identical statute, reached the same conclusion that the Idaho court reached in the Rasicot case, clearly showing that the statute does not destroy fundamental rules of agency nor does it affect the rule of law in Idaho with reference to waiver and estoppel.

The trial Court, in addition to finding on all other material allegations in favor of the appellee, found that the appellant at all times treated the insured as a member in good standing and that none of the payments were made for reinstatement (Finding 19, R. 70) and that none of the payments made to the appellant and retained by the appellant was a guarantee, representation, or warranty that the insured was in good health or that he would remain in good health for any period of time (Finding 19, R. 70); and that the payments were made for the purpose of continuing the certificate of insurance in force and that the insured was not suspended (Finding 17, R. 67); and that the insured was in good standing and the appellant's course of dealing constituted a waiver by the appellant to insist on prompt payment, and that the appellant was estopped to assert that said certificate was void or that the same was in full force and effect (Finding 20, R. 70-71).

These findings being supported by substantial evidence, the same will not be disturbed (Points and Authorities VII.).

CONCLUSION

In conclusion, it is submitted that the court's findings in favor of the appellant are amply supported by substantial evidence, and that the conclusions drawn therefrom are correct and the judgment in favor of the appellee should be affirmed.

Respectfully submitted,

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